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No. 84-878

In the Supreme Court of the United States

OCTOBER TERM, 1984

LOUIS TOM DRAGNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a district judge may reduce a sentence pursuant to Fed. R. Crim. P. 35(b), almost four months after the time limit had expired for actions under that Rule, solely because of his disagreement with officials of the Executive Branch as to the defendant's place of confinement.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute and federal rule of criminal procedure involved	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Ange v. *Paderick*, 521 F.2d 1066	7
Bugg v. *United States*, 140 F.2d 848, cert. denied, 323 U.S. 673	7
Neal v. *Jackson*, 692 F.2d 783	7
Sotto v. *Wainwright*, 601 F.2d 184, cert. denied, 445 U.S. 950	9
United States v. *Addonizio*, 442 U.S. 178	8
United States v. *Brooklier*, 685 F.2d 1208	2
United States v. *Huss*, 520 F.2d 598	7
United States v. *Kajevic*, 711 F.2d 767, cert. denied, No. 83-5536 (Jan. 9, 1984)	6, 8, 9, 10, 11
United States v. *Krohn*, 700 F.2d 1033	6, 9
United States v. *Mendoza*, 581 F.2d 89	8
United States v. *Pollack*, 655 F.2d 243	9
United States v. *Sackinger*, 704 F.2d 29	7
United States v. *Schafer*, 726 F.2d 155, cert. denied, No. 83-1663 (Nov. 28, 1984)	6, 8, 9, 10
United States v. *Smith*, 650 F.2d 206	9
United States v. *Warren*, 610 F.2d 680	6

Statutes, regulation and rules:

18 U.S.C. 1962(c)	2
18 U.S.C. 1962(d)	2
18 U.S.C. 4082(a)	1, 6, 7
28 U.S.C. 2255	8

Statutes, regulation and rules—Continued: Page

28 C.F.R. 0.96(c) 7
Fed. R. Crim. P.:
Rule 35 ..... 4, 6, 8, 9, 10
Rule 35(b) 2, 3, 5, 6, 8, 10
Rule 45(b) 8, 10

Miscellaneous:

Federal Prison System, U.S. Dep't of Justice, Federal Prison System Program Statement No. 5100.2, *Security Designation and Custody Classification System* (Oct. 7, 1982) 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 746 F.2d 457.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1984. A petition for rehearing was denied on October 31, 1984 (Pet. App. A4). The petition for a writ of certiorari was filed on November 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

18 U.S.C. 4082(a) provides:

> A person convicted of an offense against the United States shall be committed, for such term

of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

Fed. R. Crim. P. 35(b) provides:

> The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

STATEMENT

On November 14, 1980, following a seven week jury trial, petitioner was convicted in the United States District Court for the Central District of California of racketeering and conspiracy to commit racketeering activities, in violation of 18 U.S.C. 1962 (c) and (d). The district court (Hatter, J.) sentenced him to concurrent two year terms on each count and to fines totaling $50,000. The court of appeals affirmed the convictions (*United States* v. *Brooklier*, 685 F.2d 1208), and this Court denied a petition for a writ of certiorari on February 22, 1983 (459 U.S. 1206).

As recounted in the court of appeals' initial decision (685 F.2d at 1213, 1220), the evidence at trial showed that petitioner, the chief of the Los Angeles family of La Cosa Nostra, and four co-defendants engaged in a scheme to extort money from pornog-

raphers and bookmakers in the Los Angeles area. Petitioner approved of plans to shake down two individuals and employed "Jimmy The Weasel" Fratianno as his agent to extort money from the "Forex" corporation, an FBI-operated undercover pornography business. In addition, petitioner planned the murder of a colleague, Frank Bompensiero, upon learning that he was an informant.

At petitioner's sentencing on January 20, 1981, Judge Hatter imposed concurrent two year terms, recommending that they be served at a "Level 1" minimum security facility. See 7/25/83 Tr. 12; E.R. 40.[1] On the basis of its security designation and custody classification guidelines, however, the Bureau of Prisons determined that petitioner should be confined, at least for the first year, in a medium security facility. On June 21, 1983—119 days after his certiorari petition was denied—petitioner filed a motion for reduction of sentence under Fed. R. Crim. P. 35(b). The motion was premised upon the Bureau of Prisons' designation of a medium security confinement in Seagoville, Texas, a location distant from petitioner's family and business. E.R. 22-27a.[2]

At a hearing on the motion, on July 25, 1983, Judge Hatter stated (7/25/83 Tr. 12-13; E.R. 40-41):

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[1] "E.R." is the abbreviation for the Excerpt of Record in the court of appeals.

[2] The motion also stated (E.R. 27) that although petitioner "has been linked with 'Organized Crime' it is clear * * * that the community receives no service or benefit from Mr. Dragna being locked away." The motion suggested that the court consider imposing "additional community services" as an alternative to imprisonment "to allow the community to further benefit from this man's generosity and past community participation" (*ibid.*).

> I am concerned, however, because my recommendation, strong recommendation, is that [petitioner] Dragna, having met the qualifications for level one, be placed in a level one institution. And if it turns out that the Bureau of Prisons isn't prepared to do that, then I will modify the sentence and we won't have anybody to put anywhere, if they want to play that kind of game. I just think it's unfair.

Judge Hatter then repeated his recommendation that petitioner "be placed in the level of institution for which he is qualified, and that is level one, and that he be placed as close to California as possible * * *" (E.R. 43). Accordingly, he stayed petitioner's prison reporting date "until further order of the Court and the Court is informed of the designation of the place of service" (Order of July 27, 1983; E.R. 44a).

Thereafter, the Bureau of Prisons confirmed its earlier decision to incarcerate petitioner at a medium security institution rather than at a Level 1 facility as recommended by the district court (10/17/83 Tr. 3; E.R. 44b, 63). During a hearing on October 17, 1983, Judge Hatter reiterated his dismay at the Bureau for not following his recommendation and expressly asserted that for that reason alone he would reduce the two year sentence he had previously imposed (10/17/83 Tr. 11-12; E.R. 71-72):

> [T]he only change that I would make now is that I was mistaken in thinking that the Bureau of Prisons would agree to house this particular individual away from the kinds of people that I have indicated before that he didn't belong with.

Accordingly, on October 19, 1983—four months after petitioner had filed his Rule 35 motion and four

months after the deadline imposed by the Rule for action upon such motions—the court suspended the two-year sentence, and imposed five years' probation on condition that petitioner serve two consecutive six-month terms in a Community Treatment Center. It left intact the $50,000 fine.[3]

The government appealed the district court's reduction of sentence, and the court of appeals reversed (Pet. App. A1-A2). While recognizing that a district court has wide discretion under Fed. R. Crim. P. 35(b) to modify a sentence, the court held that the district court had improperly exercised this authority by using it to review and control the Bureau of Prisons' designation of the place of confinement, a decision that is wholly entrusted to the Executive Branch. It therefore vacated the district court's order and remanded the case for reinstatement of the district court's original sentence.[4]

ARGUMENT

1. Petitioner contends (Pet. 4-7) that the decision of the court below, which precludes a district court from reducing a sentence solely because of its disagreement with the place of confinement designated by the Bureau of Prisons, improperly limits the district court's "broad discretion" to reduce sentence un-

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[3] We understand that petitioner has now completed this sentence and has been released from confinement at a southern California halfway house.

[4] On October 31, 1984, the court of appeals denied a petition for rehearing (Pet. App. A4), and on November 21, 1984 it denied a motion for a stay of mandate. On December 3, 1984, Justice Rehnquist denied petitioner's application for recall of the court of appeals' mandate and stay of the court's order reinstating the sentence.

der Fed. R. Crim. P. 35(b). This claim is without merit and does not warrant further review.

We do not challenge the proposition that, as a general rule, a district court acting in timely fashion has "almost unlimited discretion under Rule 35 to reduce federal sentences upon a timely motion." *United States* v. *Warren*, 610 F.2d 680, 684 (9th Cir. 1980). But it is well established that a district court's authority under Fed. R. Crim. P. 35(b) cannot be employed so as to encroach upon determinations concerning the execution of a sentence entrusted by Congress to the Executive Branch. See, *e.g.*, *United States* v. *Schafer*, 726 F.2d 155, 157-158 (4th Cir. 1984), cert. denied, No. 83-1663 (Nov. 11, 1984) (Fed. R. Crim. P. 35(b) cannot be "misused as a substitute for the consideration of parole by the Parole Board"); *United States* v. *Kajevic*, 711 F.2d 767 (7th Cir. 1983), cert. denied, No. 83-5536 (Jan. 9, 1984) (same); *United States* v. *Krohn*, 700 F.2d 1033, 1039 (5th Cir. 1983) (the "final inquiry" is whether the district court's disposition of a Rule 35 motion "deliberately or effectively intervened in matters committed to the authority of the Parole Commission"); *United States* v. *Warren*, 610 F.2d at 683-684 (the district court may not use power under Rule 35(b) to usurp the authority of the Executive Branch to determine priority of custody between state and federal governments).

Authority to determine the place of confinement has been entrusted to the Attorney General, not to the district courts. See 18 U.S.C. 4082(a) ("[a] person convicted of an offense against the United States shall be committed * * * to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be

served"). The Attorney General, in turn, has delegated this authority to the Bureau of Prisons. 28 C.F.R. 0.96(c).[5] In accordance with that authority, the Bureau has issued detailed guidelines for determining the place of confinement appropriate for a particular offender. The guidelines take into account, inter alia, the nature of the offense, the defendant's criminal record, and any recommendation made by the sentencing court. See Federal Prison System, U.S. Dep't of Justice, Federal Prison System Program Statement No. 5100.2, *Security Designation and Custody Classification System* (Oct. 7, 1982). As the court explained in *United States* v. *Huss*, 520 F.2d 598, 602 (2d Cir. 1975), this "statutory scheme * * * permits a trial judge no * * * power [to control the place and conditions of confinement]. * * * The limit of the court's custodial sentencing power is to commit the defendant 'to the custody of the Attorney General.'" See also *United States* v. *Sackinger*, 704 F.2d 29, 30 (2d Cir. 1983); *Neal* v. *Jackson*, 692 F.2d 783, 786 n.6 (D.C. Cir. 1982); *Ange* v. *Paderick*, 521 F.2d 1066, 1068 (4th Cir. 1975); *Bugg* v. *United States*, 140 F.2d 848, 852 (8th Cir.), cert. denied, 323 U.S. 673 (1944).

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[5] Petitioner maintains (Pet. 7) that the Bureau of Prisons exceeded whatever authority it might otherwise possess to fix his place of confinement because he had not yet surrendered to the Attorney General and the Bureau therefore "did not have actual jurisdiction over [him] at the time of resentencing." However, 18 U.S.C. 4082(a) does not require the Attorney General to have physical custody of the defendant as a prerequisite to designating the place of confinement. Rather, it permits the Attorney General to make such a designation upon the district court's commitment of a prisoner to his custody. The judgment and commitment order issued by the district court at the time of sentencing, by its express terms, committed petitioner to the custody of the Attorney General.

Therefore, as the court of appeals concluded (Pet. App. A1), "[b]y attempting to assert authority over the location of confinement, the district court exceeded its jurisdiction under the resentencing statute." The district court's action in reducing petitioner's sentence solely because of disagreement concerning the Bureau of Prisons' selection of the place of confinement was as much an abuse of its authority under Fed. R. Crim. P. 35(b) as is a use of authority under Rule 35(b) or 28 U.S.C. 2255 to control the discretion of the Parole Commission. See *United States* v. *Addonizio*, 442 U.S. 178, 188-190 (1979); *United States* v. *Schafer*, 726 F.2d at 157-158; *United States* v. *Kajevic*, 711 F.2d at 771-772.

2. Under Fed. R. Crim. P. 35(b), "[t]he court may reduce a sentence * * * within 120 days after entry of any order or judgment of the Supreme Court denying review of * * * a judgment of conviction." This period is jurisdictional and may not be extended. *United States* v. *Addonizio*, 442 U.S. at 189; see Fed. R. Crim. P. 45(b). Here, as noted above, petitioner's motion to reduce sentence was not filed until 119 days after denial of his petition for a writ of certiorari, and the motion was not granted until four months after the 120-day period had expired. Whatever the rule might be with respect to the factors that may be considered by the district court when it acts within the 120-day time limit provided by Rule 35, it is clear that the court's untimely action here was erroneous.

Several courts of appeals have interpreted Rule 35 (b) to permit the district court a "reasonable time" after the expiration of the 120-day period to act on a motion to reduce sentence, provided the motion was made within the period. *United States* v. *Mendoza*, 581 F.2d 89, 90 (5th Cir. 1978) (en banc); see

United States v. *Smith*, 650 F.2d 206, 209 (9th Cir. 1981); but see *United States* v. *Kajevic*, 711 F.2d at 771 (dictum); *United States* v. *Pollack*, 655 F.2d 243, 245 (D.C. Cir. 1980). All courts of appeals that have considered the question, however, have agreed that this nonliteral interpretation cannot be stretched to permit the district court to assume authority to review decisions regarding parole or place of confinement entrusted to the Executive Branch. *E.g.*, *United States* v. *Schafer*, 726 F.2d at 157-158; *United States* v. *Kajevic*, 711 F.2d at 771-772; *United States* v. *Krohn*, 700 F.2d at 1039. Indeed, one of the basic purposes of the time limitation on the power to reduce sentence is to guarantee that "trial courts will not inadvertently usurp the power of the [Executive Branch] by making delayed rulings on motions to mitigate." *Sotto* v. *Wainwright*, 601 F.2d 184, 192 (5th Cir. 1979), cert. denied, 445 U.S. 950 (1980).

The record in this case leaves no room for doubt that the district court's action under Rule 35 was precisely and only for the purpose of countermanding the Bureau of Prisons' designation of petitioner's place of confinement. The district judge stated on July 25, 1983, that if the Bureau of Prisons "isn't prepared to do that [follow the court's recommendations]" then "I will modify the sentence and we won't have anybody to put anywhere, if they want to play that kind of game" (7/25/83 Tr. 13; E.R. 41). The court then stayed petitioner's prison reporting date and held in abeyance a final ruling on the motion expressly to await a report by the Bureau as to its final designation of a place of confinement (E.R. 44a). On October 17, 1983, when the court granted petitioner's motion for reduction of sentence, the judge stated (10/17/83 Tr. 11-12; E.R. 71-72) that the

"only change" he would make in his original sentencing determination was that he was "mistaken in thinking that the Bureau of Prisons would agree to house this individual" in accordance with his recommendation. To delay action on a Rule 35 motion for four months after the jurisdictional deadline for the express purpose of overseeing the executive's performance of its discretionary responsibilities is not a "reasonable" delay by any standard.

On this ground, the instant case is indistinguishable from the decisions in *Schafer* and *Kajevic*, in each of which this Court has recently denied a petition for certiorari raising a similar issue.[6] There is no reason why this case is any more worthy of review.

c. Petitioner also argues (Pet. 7-8) that, even if the court below were correct in its holding that the district court exceeded its authority under Fed. R. Crim. P. 45(b), it should not have ordered reinstatement of the original sentence but should have remanded the case to the district court for further action on the motion. However, by delaying disposition of the motion for almost four months past the deadline solely to see what action would be taken by the Bureau of Prisons, the district court lost its jurisdiction to reduce petitioner's sentence. See Fed. R. Crim. P. 35(b); *United States* v. *Schafer*, 726 F.2d

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[6] Petitioner attempts (Pet. 6) to distinguish *Schafer* on the ground that it involved a motion to reduce sentence in the nature of a petition for a writ of habeas corpus. This contention is incorrect. In *Schafer*, the defendant's motion to reduce sentence was expressly based upon Fed. R. Crim. P. 35(b), and the court's decision was limited to addressing the propriety of the district court's action under that rule. 726 F.2d at 157.

at 156; *United States* v. *Kajevic*, 711 F.2d at 771-772. If the district court lacked jurisdiction to modify the sentence, the appropriate disposition was to reinstate the original sentence.

Even assuming the district court still possessed jurisdiction to act on the motion, however, a remand would have been fruitless. It plainly appears from the district judge's remarks during the October 17, 1983, hearing that the *only* reason why he deemed reduction of the sentence appropriate was his disagreement with the place designated for applicant's confinement (E.R. 71-72; see pages 9-10, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

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